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LIVE CAPITAL SDN BHD v. PIONEER CONGLOMERATE SDN BHD

FEDERAL COURT, PUTRAJAYA
ABDUL RAHMAN SEBLI CJ (SABAH & SARAWAK)
ABU BAKAR JAIS FCJ
B VAZEER ALAM MYDIN MEERA FCJ
[CIVIL APPEAL NO: 02(F)-65-11-2023(W)]
5 JUNE 2025

Abstract – *(i) Where the contents/notations written on a document are disputed and/or alleged to have been added after the document is signed/initialed, the contents/notations are deemed not proven upon the document being marked as an exhibit at trial and it is incumbent upon the party relying on the document and the disputed contents/notations to call the maker of the document and/or the author of the contents/notations to prove the same; (ii) Where a document has been tendered and marked as exhibit during a trial and part of its contents are disputed, the court is obliged to assess the veracity, truthfulness of the contents of the said document and the weight to be accorded to the said document provided the same has been properly admitted in evidence.*

EVIDENCE: *Documentary evidence – Notations and alterations on documents – Contents/notations written on documents alleged to have been added after document was signed/initialed – Dispute over veracity, authenticity and truthfulness of documents – Burden of proof, admissibility of evidence and weight to be accorded to disputed documentary evidence produced and marked as exhibits during course of trial – Whether contents/notations deemed proven upon documents being marked as exhibit at trial – Whether hearsay – Whether incumbent upon party relying on documents and disputed contents/notations to call maker/author of documents/contents – Whether documents properly admitted in evidence – Whether court obliged to asses veracity, truthfulness of contents of documents and weight to be accorded to documents*

The respondent claimed against the appellant (formerly known as Tenggara Kapital Sdn Bhd), at the High Court, for the return of an interest-free loan of RM7 million that it had advanced to the appellant by way of two cheques, in the sums of RM5 million and RM2 million, respectively. The respondent had prepared two vouchers for the issuance of the two cheques. The appellant's witness ('DW2') stated that: (i) although the signature on the first voucher was his, the typewritten words 'Being paid as Advance to Tenggara Kapital Sdn Bhd' were not there at the time he signed the document; and (ii) there was a deletion on the second voucher where the typed-out words 'Being ===' had been substituted with the handwritten notation 'Advance to

Tenggara'. The cumulative effect of the above, according to the appellant, painted the impression that the RM5 million and RM2 million were advances, as claimed by the respondent, and not commissions as pleaded by the appellant in its defence. After the bundle of documents were delivered to the appellant's solicitors before the trial, the appellant's solicitors requested for inspection of the original vouchers but received no reply from the respondent. As the authenticity and contents of the vouchers were disputed and required strict proof, parties agreed that they were Part C documents. During trial, the admissibility of the vouchers became an issue. The High Court accepted DW2's evidence that the notation and alterations on the two vouchers, *ie*, P1 and P2, were not there when DW2 signed them, which meant that they were added/altered by someone unknown to DW2 after he signed them. Despite this adverse finding of fact against the respondent, the Court of Appeal reversed the whole decision of the High Court. The Court of Appeal was of the opinion that the appellant's failure to discharge the evidential burden to prove that the vouchers had been forged, altered or tampered with, led to the acceptance of the contents of P1 and P2 as truth, thus providing the respondent with sufficient evidence to prove its claim that the RM7 million was an advance and not a commission. Hence, the present appeal.

Held (allowing appeal)
Per Abdul Rahman Sebli CJSS delivering the judgment of the court:

(1) For P1 and P2 to be used as evidence in support of the respondent's claim, they must first be proved to have been properly admitted in evidence. It was not the duty of the appellant to ensure proper admission of the two documents as exhibits, let alone to prove that they had been forged, altered or tampered with. Furthermore, P1 and P2 were not the originals of the two vouchers and no reasonable effort was made at all to find the maker/makers of the documents. (paras 26 & 29)

(2) What the Court of Appeal set as precedent, which was a dangerous one, was that the authenticity and contents of disputed documents, *ie*, Part C documents, need not be verified by the maker of the documents before they could be admitted in evidence and that all that was required of the party seeking to rely on such documents was to have them marked as exhibits and once that was done, the contents of the documents were deemed to be the truth. The procedure adopted by the Court of Appeal was unknown to law. Unless the authenticity of the two vouchers had been verified, by calling the maker/makers of the documents, the contents of the documents remained hearsay as the purpose of producing them was to prove the truth of the contents and not merely to prove that the notations and alterations were made. The respondent had no other purpose in producing P1 and P2 as exhibits other than to prove that the RM7 million was an advance and not a commission. They were, therefore, caught by the rule against hearsay. (paras 31 & 32)

(3) The fact that DW2 signed two payment vouchers did not make him the maker of the documents, as the dispute was not over his signatures but over the authenticity and truth of the contents. It was also misconceived for the respondent to have placed importance on the fact that the respondent admitted to signing P1 and P2. Both the clerk and the company secretary of the respondent would have been in a position to adduce the best evidence available as they would be able to testify on the notation and alterations on the two payment vouchers as well as the entries in the general ledger. The High Court was justified to draw adverse inference against the respondent for failing to call the maker/makers of P1 and P2. (paras 34-36)

Bahasa Melayu *Headnotes*

Responden menuntut terhadap perayu (yang dahulunya dikenali sebagai Tenggara Kapital Sdn Bhd), di Mahkamah Tinggi, untuk pemulangan pinjaman bebas faedah, berjumlah RM7 juta, yang diberi kepada perayu melalui dua keping cek, masing-masing berjumlah RM5 juta dan RM2 juta. Responden telah menyediakan dua baucar susulan pengeluaran dua cek tersebut. Saksi perayu ('DW2') menyatakan bahawa: (i) walaupun tanda tangan pada baucar pertama adalah miliknya, perkataan-perkataan yang tertera 'Being paid as Advance to Tenggara Kapital Sdn Bhd' tiada di situ semasa dia menandatangani dokumen tersebut; (ii) terdapat pemotongan dalam baucar kedua iaitu perkataan 'Being ===' yang tertera diganti dengan notasi bertulis 'Advance to Tenggara'. Kesan terhimpun di atas, menurut perayu, menggambarkan seolah-olah jumlah RM5 juta dan RM2 juta tersebut adalah pendahuluan, seperti yang dinyatakan oleh responden, bukan komisen seperti yang diplidkan oleh perayu dalam pembelaannya. Selepas ikatan dokumen diserahkan pada peguam cara perayu sebelum perbicaraan, peguam cara perayu memohon satu pemeriksaan baucar-baucar asal tetapi tidak mendapat maklum balas daripada responden. Oleh kerana kesahan dan kandungan baucar-baucar dipertikai dan mengkehendaki pembuktian ketat, pihak-pihak bersetuju bahawa kesemuanya adalah dokumen Bahagian C. Semasa perbicaraan, kebolehterimaan baucar-baucar ini menjadi isu. Mahkamah Tinggi menerima keterangan DW2 bahawa notasi dan pindaan pada kedua-dua baucar, iaitu P1 dan P2, tiada di situ ketika DW2 menandatanganinya; ini bermakna notasi dan pindaan ini ditambah/dipinda oleh seseorang yang tidak DW2 kenali selepas dia menandatanganinya. Walaupun dapatan fakta bertentang dibuat terhadap responden, Mahkamah Rayuan mengakas keseluruhan keputusan Mahkamah Tinggi. Mahkamah Rayuan berpendapat bahawa kegagalan perayu melepaskan beban pembuktian, bahawa baucar-baucar tersebut telah dipalsukan, dipinda atau diusik, mendorong pada penerimaan kandungan P1 and P2 sebagai kebenaran, lantas memperuntukkan responden dengan bukti yang secukupnya untuk membuktikan tuntutannya bahawa RM7 juta tersebut adalah satu pendahuluan dan bukan komisen. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan)
Oleh Abdul Rahman Sebli HBSS menyampaikan penghakiman mahkamah:

(1) P1 dan P2 mestilah terlebih dahulu dibuktikan telah diterima sebagai keterangan sebelum digunakan sebagai keterangan yang menyokong tuntutan responden. Bukan tugas perayu untuk memastikan kemasukan kedua-dua dokumen sebagai ekshibit adalah teratur, apatah lagi untuk membuktikan bahawa kedua-duanya telah dipalsukan, dipinda atau diusik. Selanjutnya, P1 dan P2 bukan dokumen asli kedua-dua baucar dan tiada langsung usaha munasabah yang dibuat untuk mencari pembuat/pembuat-pembuat dokumen-dokumen tersebut.

(2) Mahkamah Rayuan telah menetapkan sebagai duluan, dan ini sesuatu yang merbahaya, bahawa kesahan dan kandungan dokumen-dokumen yang dipertikai, iaitu dokumen-dokumen Bahagian C, tidak perlu disahkan oleh pembuat dokumen-dokumen sebelum kesemuanya diterima sebagai keterangan dan bahawa yang dikehendaki cumalah agar pihak yang ingin bersandar pada dokumen-dokumen sedemikian menanda sebagai ekshibit dan, apabila ini telah dilakukan, kandungan dokumen dianggap sebagai sesuatu yang benar. Tatacara yang diguna pakai oleh Mahkamah Rayuan bukan tatacara yang diketahui bawah undang-undang. Kecuali jika ketulenan kedua-dua baucar telah disahkan, dengan memanggil pembuat/pembuat-pembuat dokumen-dokumen, kandungan dokumen-dokumen tersebut kekal dengar-cakap kerana tujuan mengemukakannya adalah demi membuktikan kebenaran kandungan dan bukan sekadar membuktikan notasi dan pindaan ada dibuat. Responden tiada tujuan lain dalam mengemukakan P1 dan P2 sebagai ekshibit kecuali untuk membuktikan bahawa RM7 juta tersebut adalah pendahuluan dan bukan komisen. Oleh itu, kesemuanya terjerat oleh kaedah yang melarang dengar-cakap.

(3) Fakta bahawa DW2 menandatangani dua baucar bayaran tidak menjadikan dia pembuat kedua-dua dokumen tersebut kerana pertikaian bukanlah terhadap tanda tangannya tetapi terhadap kesahan dan kebenaran kandungannya. Satu salah tanggapan untuk responden memberi kepentingan pada fakta bahawa responden mengakui menandatangani P1 dan P2. Kedua-dua kerani dan setiausaha syarikat responden dalam kedudukan untuk mengemukakan keterangan sedia ada yang terbaik kerana mereka boleh memberi keterangan tentang notasi dan pindaan dalam dua baucar bayaran tersebut dan juga kemasukan dalam lejar am. Mahkamah Tinggi berjustifikasi dalam membangkitkan anggapan bertentangan terhadap responden atas kegagalannya memanggil pembuat/pembuat-pembuat P1 dan P2.

Case(s) referred to:

Chong Khee Sang v. Phang Ah Chee [1983] CLJU 57; [1983] 1 LNS 57 HC ***(refd)***

Mahmod Kailan v. Goh Seng Choon & Anor [1976] CLJU 68; [1976] 1 LNS 68 HC ***(refd)***

Mohamad Fauzi Che Rus v. JR Joint Resources Holdings Sdn Bhd [2016] 6 CLJ 266 HC ***(refd)***

Pioneer Conglomerate Sdn Bhd v. Tenggara Kapital Sdn Bhd [2023] CLJU 1626; [2023] 1 LNS 1626 CA ***(refd)***

Raja Chandranath Roy v. Ramjai Mazumdar 6 BLR 303 ***(refd)***

Stoney v. Eastbourne R D Council (1927) 1 Ch 367 ***(refd)***

Subramaniam v. PP [1956] CLJU 115; [1956] 1 LNS 115 ***(refd)***

Tetuan Wan Shahrizal, Hari & Co v. PP [2023] 4 CLJ 843 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 96(a)

Evidence Act 1950, ss. 67, 73A(1), 101, 102

For the appellant - Khrishna Dallumah, Jasbeer Singh, Nur Hakimah Mohamad, Yong Yoong Hui & Aradhna Kaur; M/s Jasbeer, Nur & Lee

For the respondent - Gurdit Singh Kesar Singh & Nashvinder Singh Gill; M/s Ram Yogan Sivam

Reported by Najib Tamby

JUDGMENT

Abdul Rahman Sebli CJ (Sabah & Sarawak):

[1] The four questions of law that the appellant had been granted leave to appeal under s. 96 of the Courts of Judicature Act 1964 ('the CJA') concern an important area of the law of evidence and procedure. They are as follows:

(i) where the contents/notations written on a document are disputed and/or alleged to have been added after the document was signed/initialled, are the contents/notations deemed proven upon the document being marked as an exhibit at trial?

(ii) where the contents/notations written on a document are disputed and/or alleged to have been added after the document was signed/initialled, is it incumbent upon the party relying on the document and the disputed contents/notations to call the maker of the document and/or the author of the contents/notations to prove the same?

(iii) when a document is tendered and marked as an exhibit during a trial, is it incumbent upon the court to treat the entire contents of the said document as having been proven?

(iv) where a document has been tendered and marked as an exhibit during a trial and part of its contents are disputed, is the court obliged to assess the veracity, truthfulness of the contents of the said document and the weight to be given to the said document on the basis of the oral and other documentary evidence adduced before the court?

[2] As can be seen, there is nothing novel about the questions. They relate to the trite and tested questions of burden of proof, admissibility of evidence and weight to be given to disputed documentary evidence produced and marked as exhibits during the course of the trial, the law on which is well settled and has not been the subject of any serious controversy as far as we are aware.

[3] The need for further argument before this court, however, arose due to the manner in which the Court of Appeal dealt with the disputed documentary evidence which may cause confusion and uncertainty at trials, bearing in mind its written grounds of judgment as reported in *Pioneer Conglomerate Sdn Bhd v. Tenggara Kapital Sdn Bhd* [2023] CLJU 1626; [2023] 1 LNS 1626; [2023] 5 MLJ 581 binds all courts below the Court of Appeal based on the doctrine of *stare decisis*.

[4] It would be otherwise if no written grounds had been given, in which case the decision would have no binding effect: See the decision of this court in *Tetuan Wan Shahrizal, Hari & Co v. PP* [2023] 4 CLJ 843; [2023] 4 MLJ 1. The questions posed for our determination are therefore questions of importance upon which a decision of this court would be to public advantage within the meaning of the second limb to s. 96(a) of the CJA.

[5] The facts are simple. On 31 May 2019, the respondent (as plaintiff) filed a civil action in the High Court against the appellant (as defendant) for the return of an interest free loan of RM7 million (Ringgit Malaysia Seven Million) that it had advanced to the appellant *vide* two cheques dated 3 November 2017 and 15 November 2017 in the sums of RM5 million and RM2 million respectively.

[6] The appellant admitted that it had received the said sum of RM7 million from the respondent but denied that it was an interest-free loan as claimed by the respondent. Rather, it was an agreed commission fee for the brokerage services it provided to the respondent for the acquisition of Ta Win Sdn Bhd ('Ta Win') shares, a public listed company, which the respondent intended to take control of, and therefore non-refundable.

[7] According to the appellant, the services were provided through the respondent's Managing Director Dato' Chin Swee Chong (PW1) and that the services rendered had in fact led to the respondent gaining effective control of Ta Win.

[8] The respondent prepared two vouchers for the issuance of the two cheques. The first, dated 3 November 2017, was for the sum of RM5 million. Dato' Sri Ngu Tieng Ung (DW2) who testified on behalf of the appellant confirmed that the signature on the voucher was his signature but alleged that the typewritten words "Being paid as Advance to Tenggara Kapital Sdn Bhd" were not there at the time he signed the document

(Tenggara Kapital Sdn Bhd was the former name of the appellant). The typewritten words gave the impression that the RM5 million was an advance as claimed by the respondent and not a commission as pleaded by the appellant in its defence.

[9] The second voucher was for the sum of RM2 million and was prepared by one 'Hanna' on 15 November 2017. There was a deletion on the voucher. The typed-out words "Being ===" had been substituted with the handwritten notation "advance to Tenggara". This handwritten notation was not there when DW2 signed the document. It gave the impression that the RM2 million was an advance as claimed by the respondent and not a commission as pleaded by the appellant in its defence.

[10] After the bundle of documents was delivered to the appellant's solicitors before the trial, the appellant's solicitors requested for inspection of the original vouchers *vide* letters dated 9 October 2020 and 30 October 2020 but received no reply from the respondent. This prompted the appellant's representative to lodge a police report on 7 November 2020.

[11] It was agreed by both parties that the two vouchers were Part C documents, which means both the authenticity and contents of the documents were disputed and required strict proof. At the trial, the admissibility of the vouchers became an issue. This is reflected in the following engagements between the learned Judicial Commissioner ('JC') and learned counsel for the appellant:

YA: But you have, you have, you confirmed that page 1 and 3 of Bundle B are treated as Part C documents, yes?

RM: That's upon their request, Yang Arif.

YTH: Actually we did write in to request for the original. We will share screen now on the letter.

YA: No, no, that's alright. As long as it's already, it's considered as Part C document, the rest it depends on how you conduct the trial.

YTH: Sure.

YA: Issue of admissibility of the document, alright.

…

YA: The Part 1. Page 1 and 3 considered as Part C document.

RM: Yes.

[12] During the examination-in-chief of PW1, he identified the two vouchers as the vouchers that his company prepared for the issuance of the two cheques, following which counsel asked for the documents to be marked as IDP1 and IDP2, which means the documents were produced for identification purposes only and not to prove the authenticity and truth of the contents. It was therefore acknowledged by counsel for the respondent that the authenticity and contents of IDP1 and IDP2 had yet to be proved.

[13] PW1 was not the maker of IDP1 and IDP2 and therefore not in a position to verify the authenticity and truth of the contents. Learned counsel for the respondent told the court that he had the originals of IDP1 and IDP2 with him but as it turned out, they were never produced at any time during the trial. Nor were they established as secondary evidence of the originals.

[14] In cross-examination, PW1 agreed with learned counsel for the appellant that the authenticity of IDP1 and IDP2 was disputed by the appellant. He further agreed that based on the balance sheet as at 31 December 2017 signed by himself, there was an amount of RM45,418,070 (Ringgit Malaysia Forty-Five Million Four Hundred Eighteen Thousand and Seventy) for the investment of Ta Win shares. This sum included the RM5 million and RM2 million appearing on the two cheques dated 3 November 2017 and 15 November 2017 under the respondent's General Ledger for the investment of Ta Win. The General Ledger, which was also signed by PW1, recorded "Investment – TAWIN". Tellingly there was no mention of the word "advance" in the General Ledger, which is rather odd if indeed the RM7 million was an advance and not a commission.

[15] At the defence stage of the hearing there was some disagreement over the marking of IDP1 and IDP2 as exhibits. Learned counsel for the respondent had asked for IDP1 and IDP2 to be marked as exhs. P1 and P2 after defence witness DW2 confirmed that the signatures on the two vouchers were his signatures, but was objected to by learned counsel for the appellant. The learned JC resolved the disagreement by marking IDP1 and IDP2 as exhs. P1 and P2 "conditionally" as can be seen from the following record of the proceedings:

> YA: Yes, so I allow the documents to be admitted but expressly reserved the Defendant's right disputing the correctness or otherwise of the description. You are allowed to submit at the end of the day that there was tampering of this document right but the fact is that there is such a document except that the content or description has been tempered with, that's description has been tampered with, that's all. Your position is not prejudiced at all, isn't it?
>
> TSC: Yes, Yang Arif, so long as it's recorded then we will leave it to submission.

[16] At the close of the case for the respondent, the appellant had the option of either to call evidence or not to call evidence. It chose the former. It turned out to be the right decision as the learned JC decided in its favour by dismissing the respondent's claim *inter alia* on the following grounds:

(i) the respondent's case rested entirely on the two payment vouchers exhs. P1 and P2 which were disputed by the appellant as they had notations which were not present at the time the vouchers were acknowledged by the appellant's representatives. The notations made

references to "advances". There was no evidence led by the respondent to explain when these notations were made and/or who added the notations on the payment vouchers after the appellant had signed the same. The authenticity and genuineness of these critical contents of the payment vouchers were disputed. However, the respondent did not lead any evidence to prove the authenticity and genuineness of the payment vouchers;

(ii) the appellant's evidence was that the vouchers were filled in later and the handwriting notations were also inserted later;

(iii) although the payment vouchers were tendered and conditionally marked as exhs. P1 and P2, the veracity and authenticity of the disputed contents of the payment vouchers, specifically the notations thereon, had not been proven and therefore the respondent failed to discharge its burden of proof to satisfy the court that the payment was an advance which was repayable, as alleged by the respondent;

(iv) the respondent's own documents showed that the RM7 million was an agreed commission fee for the purchase of Ta Win shares. The respondent's general ledger which was signed by the respondent's sole witness (PW1) and tendered as evidence in court noted that the RM7 million was part of the "Investment – Ta Win" totalling RM45,418,070. There was a glaring absence of any reference to "advance" in the general ledger;

(v) the respondent failed to discharge its burden of proof that the RM7 million was an advance, whether by way of any written document or loan agreement or even a Board of Director's resolution of the respondent authorising such advance, or any credible testimony of the respondent's witness to support the averment;

(vi) as the respondent failed to produce any cogent evidence to prove the genuineness of the payment vouchers, it failed to discharge its burden of proof;

(vii) the appellant on the other hand had called five witnesses to support its defence. DW2, a director of the appellant, testified that the payment vouchers were tampered with and the handwritten alterations on the payment vouchers particularly exh. P2, were not made by him;

(viii) a comparison of DW2's handwriting was done under s. 67 of the Evidence Act 1950 before the court to prove that the handwriting was not that of DW2;

(ix) the evidential burden remained with the respondent to prove the disputed contents of the payment vouchers and the identity of the person who made the notations; and

(x) on the balance of probabilities, the handwritten notations on the payment vouchers were not proven and that the respondent failed to discharge its legal and evidential burden of proving that the RM7 million was an advance as alleged by the respondent.

[17] What is clear from the grounds of judgment is that the learned JC accepted DW2's evidence that the notation and alterations on the two vouchers were not there when DW2 signed them, which means they were added or altered by someone unknown to DW2 after he signed them. In short, P1 and P2 had been tampered with.

[18] Despite this adverse finding of fact against the respondent, the Court of Appeal reversed the whole decision of the High Court for reasons which can be summarised as follows:

(i) the learned JC did not fully and judicially appreciate the fact that the appellant's allegation of tampering of exhs. P1 and P2 with respect to the typewritten words and handwritten notation of the RM5 million and RM2 million was not pleaded;

(ii) the handwriting of DW2 was not challenged and that the evidential burden had shifted to the appellant. The appellant could always produce its general ledger or audited accounts to show that the substantial sum of RM7 million was received as a commission and not captured as a loan. That would have settled the matter;

(iii) the appellant took 18 months to lodge a police report regarding the alleged alteration of the payment vouchers and this must be held against the appellant. The originals of P1 and P2 had been produced at the hearing and indeed if the appellant had wanted to examine the originals, they could have filed a discovery application for the originals to be produced and inspected;

(iv) the appellant's application to amend was not allowed and the contemporaneous documents must be taken to mean what they say especially when the appellant itself had exhibited them in its striking out application without any qualification that the two payment vouchers had been tampered with;

(v) the learned JC failed to appreciate that the evidential burden had already shifted to the appellant to prove that the RM7 million was not an interest free advance but a non-refundable commission. In the circumstances of the case the appellant failed to rebut that evidence of the respondent;

(vi) the appellant's averment at the trial that the handwritten notes were added after DW2 had acknowledged the payment vouchers amounted to an allegation of forgery, which had to be proven by the appellant on a balance of probabilities;

(vii) the appellant's solicitor failed to immediately take steps to notify the respondent's solicitor that the payment vouchers were forged, altered or tampered with;

(viii) the appellant failed to commence court proceedings to challenge the payment vouchers; and

(ix) since the appellant failed to discharge its evidential burden of proving forgery of the payment vouchers, it was incumbent on the learned JC to accept the contents of the payment vouchers as the truth and to enter judgment for the respondent.

[19] The evidential burden that the Court of Appeal was speaking of in sub-paras. (b), (e), (f) and (i) above was supposedly the appellant's burden to prove that the vouchers had been forged, altered or tampered with. It was this failure by the appellant to discharge that evidential burden of proof that led the Court of Appeal into accepting the contents of the two vouchers P1 and P2 as the truth, thus providing the respondent with sufficient evidence to prove it's claim that the RM7 million was an advance and not a commission.

[20] This penultimate finding of fact by the Court of Appeal on exhs. P1 and P2 is found at para. [31] of the grounds of judgment which we reproduce below for context:

> [31] We would conclude on the dispute pertaining to the validity and probative value of Exhs. P1 and P2 that as the Appellant had duly produced the original documents and DW2 himself had admitted having signed these exhibits, the Appellant had adduced sufficient evidence to discharge its onus of proof. Hence, the evidential burden shifted to the Respondent to adduce sufficient evidence to prove the serious allegation of forgery and/or tampering. In all the circumstances alluded to, the Respondent had clearly failed to discharge the onus of proving this sweeping allegation that Exh. P.1 and P.2, which were central to the Appellant's claim were not genuine.

[21] First of all, it was factually incorrect for the Court of Appeal to say that the respondent had produced the originals of the two vouchers. The record shows that they were never produced at the trial. As we mentioned, the two vouchers, which were initially marked IDP1 and IDP2 (for identification purposes only), were converted to exhs. P1 and P2 (as proof of authenticity and truth of contents) at the instance of learned counsel for the respondent after DW2 identified his signatures on the two vouchers. P1 and P2 were not the originals of the two vouchers.

[22] As for the burden of proof, we must say with all due respect that it was wrong for the Court of Appeal to have imposed such evidential burden of proof on the appellant. Before any burden legal or evidential shifted to the appellant, it must first be shown that the respondent had succeeded in

establishing a *prima facie* case against the appellant. Should it fail to do so, the appellant need not even call evidence in answer to the respondent's claim as the respondent would then have failed to discharge its legal and evidential burden under ss. 101 and 102 of the Evidence Act 1950 ('the Evidence Act') to prove its pleaded case that the RM7 million was an advance and not a commission. To paraphrase the Privy Council in *Raja Chandranath Roy v. Ramjai Mazumdar* 6 BLR 303, in that situation the appellant could say to the respondent: "It is wholly immaterial whether I prove my case or not. You have not proved yours."

[23] *Prima facie* evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if believed unless rebutted or the contrary proved: See *The Dictionary of English Law* (1st edn) edited by Earl Jowitt, the Lord High Chancellor of Great Britain 1945-1951 and Clifford Walsh, Solicitor of the Supreme Court. If on the face of it sufficient evidence exists to support a case, then a *prima facie* case is established. The following observations by Lord Hanworth MR in an old case of *Stoney v. Eastbourne R D Council* (1927) 1 Ch 367, 397 is instructive:

> It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on the one side or the other, and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is meant is, that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour **if there is no other evidence.** (emphasis added)

[24] In the context of the present case, "other evidence" means other evidence coming from the respondent as claimant at the trial. Thus, for the respondent to make out a *prima facie* case against the appellant or, to put it another way, to prove its case sufficiently to justify a judgment in its favour if there was no other evidence, it was incumbent on the respondent to prove, on the balance of probabilities, that the two vouchers P1 and P2 were both authentic and contained the truth. There can be no argument that without P1 and P2, the respondent would have no sustainable claim against the appellant as these two documents formed the pillars of its case against the appellant without which the entirety of its case would collapse to the ground.

[25] The Court of Appeal relied on other documents produced by the respondent to support its finding that the respondent had proved its claim that the RM7 million was an advance but these were merely supporting documents which were insufficient on their own and by themselves to justify a judgment in the respondent's favour if there was no other evidence. It was therefore wrong for the Court of Appeal to have substituted the High Court's

finding of fact on P1 and P2 with its own finding on the basis, as contended by the respondent, that the testimony of its sole witness, namely PW1 was backed by unchallenged documentary evidence.

[26] More importantly, for P1 and P2 to be used as evidence in support of the respondent's claim, they must first be proved to have been properly admitted in evidence. It was not the duty of the appellant to ensure proper admission of the two documents as exhibits, let alone to prove that they had been forged, altered or tampered with.

[27] Although the Court of Appeal did not say so in so many words, it is clear that it accepted the respondent's contention that it had fulfilled the requisite conditions for the admission of the two vouchers under s. 73A(1) of the Evidence Act. No reason was given for acceding to the respondent's argument other than to cite the High Court case of *Mohamad Fauzi Che Rus v. JR Joint Resources Holdings Sdn Bhd* [2016] 6 CLJ 266; [2016] 8 MLJ 739. The section provides as follows:

> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on the production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
>
> (a) If the maker of the statement either –
>
> (i) Had personal knowledge of the matters dealt with by the statement; or
>
> (ii) Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had personal knowledge of those matters; and
>
> (iii) If the maker of the statement is called as a witness in the proceedings:
>
> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been without success.

[28] We do not see how the provision applies in favour of the respondent. First, P1 and P2 were not the originals of the two vouchers and secondly, no reasonable effort was made to find the maker or makers of the documents.

In fact no effort at all was made. In *Mahmod Kailan v. Goh Seng Choon & Anor* [1976] CLJU 68; [1976] 1 LNS 68; [1976] 2 MLJ 239, the appellant had sought to prove that he was a labour contractor by producing a letter from a construction company, but no one from the company was called to give evidence. Suffian LP sitting with Lee Hun Hoe CJ (Borneo) and Ali FJ of the former Federal Court said at p. 240:

> At the trial Mr. Tay tried to have this letter admitted in evidence under section 73A(1) of the Evidence Act, *ie*, without calling anybody from the company to give evidence. Mr. Tay called as witness a clerk of the plaintiff's solicitor who said he went to the company's premises on July 11, 1975, but found it's sign-board missing and was told by some people on the first floor that the company had shifted but nobody knew where to and that he could not find the company's address in the phone book either. The learned trial judge did not admit the letter on the ground that the witness never enquired from the Business Registration Department nor of the Registry of Companies. With respect I think that in these circumstances not all reasonable efforts have been made to find the author of the letter within the meaning of the proviso to subsection (1) of section 73A of the Evidence Act and that therefore the learned judge was right in refusing to admit the letter.

[29] Did the learned JC follow the correct procedure in admitting and marking the two vouchers as exhibits? We think not. The proper procedure was for him to postpone the marking of IDP1 and IDP2 as exhs. P1 and P2 until after the maker or makers of the documents were called to give evidence, which was never done. Until then, the two vouchers should remain as IDP1 and IDP2, *ie*, for identification purposes only and not for the purpose of proving the truth of their contents as they were disputed both as to authenticity and contents. But to be fair to the learned JC, having converted IDP1 and IDP2 to exhs. P1 and P2, he did give learned counsel for the appellant the right to challenge the correctness or otherwise of the "description" of the two documents and to submit on tampering.

[30] By "description" the learned JC could only mean the contents of P1 and P2 which he made clear the respondent still needed to prove although the two documents had been marked as exhibits. But that goes more to the issue of weight rather than to the issue of admissibility. For any weight to be attached to the contents of the documents, the documents must first of all be documents that had properly been admitted in evidence. Nothing short of that will suffice.

[31] What the Court of Appeal set as precedent, a dangerous one we would say, is that the authenticity and contents of disputed documents, *ie*, Part C documents need not be verified by the maker of the documents before they can be admitted in evidence and that all that is required of the party seeking to rely on such documents is to have them marked as exhibits, and once that is done, the contents of the documents are deemed to be the truth.

[32] With due respect to the learned judges of the Court of Appeal, the procedure they adopted is unknown to law. Unless the authenticity of the two vouchers had been verified by calling the maker or makers of the documents, the contents of the documents remained hearsay as the purpose of producing them was to prove the truth of the contents and not merely to prove that the notation and alterations were made (*Subramaniam v. PP* [1956] CLJU 115; [1956] 1 LNS 115; [1956] 1 MLJ 220). Clearly, the respondent had no other purpose in producing P1 and P2 as exhibits other than to prove that the RM7 million was an advance and not a commission. They were therefore caught by the rule against hearsay.

[33] A document cannot be admitted in evidence and marked as such until it has been properly proved: See the judgment of Shankar J (as he then was) in *Chong Khee Sang v. Phang Ah Chee* [1983] CLJU 57; [1983] 1 LNS 57; [1984] 1 MLJ 377. Such a document has no evidential value, is irrelevant and should not be admitted in evidence and if admitted must be disregarded.

[34] The fact that DW2 signed on the two payment vouchers did not make him the maker of the documents as the dispute was not over his signatures but over the authenticity and truth of the contents. It was therefore wrong for the learned JC to have converted IDP1 and IDP2 to exhs. P1 and P2 simply because DW2 confirmed that the signatures on the two documents were his signatures. For the same reason, it was misconceived for the respondent to have placed importance on the fact that the respondent admitted to signing P1 and P2. Any other hypothesis would mean that anyone would be free to tamper with documents without the knowledge of the person who signed the documents and the documents could still be used against him without the need for the party seeking to rely on the documents to verify the authenticity of the documents. That cannot be a correct position of the law.

[35] Both the clerk and the company secretary of the respondent would have been in a position to adduce the best evidence available as they would be able to testify on the notation and alterations on the two payment vouchers as well as the entries in the general ledger. No explanation was proffered as to why these witnesses were not called or made available at the trial. It is trite law that failure to call material witnesses will result in the invocation of adverse inference. In *Sarkar on Evidence* (14th edn), the learned authors dealt with the matter in the following terms:

> Everything is to be presumed against a party who keeps his adversary out of possession of evidence by taking means of retaining the evidence in his own custody. A similar presumption may also arise when a party does not call witnesses who are within his reach and are acquainted with the facts of the case … When a party failed to call as his witness the principal person involved and who was in a position to give a first hand account of the matter in controversy and who could have refuted on oath the allegation on the other side, it is legitimate to draw an adverse inference …

[36] The learned JC was therefore justified in the circumstances to draw adverse inference against the respondent for failing to call the maker or makers of exhs. P1 and P2. Casting aside exhs. P1 and P2 for being inadmissible and irrelevant, it is clear that at the close of its case, the respondent produced no credible evidence documentary or otherwise to prove, on a *prima facie* basis, that the RM7 million was an advance and not a commission. There was therefore nothing for the appellant to answer to the respondent's claim that the RM7 million was an advance and not a commission.

[37] At the risk of repetition, it needs to be emphasised that the appellant had neither the legal nor evidential burden to prove forgery of the two vouchers or, for that matter, to prove anything at all if otherwise the respondent had failed to establish a *prima facie* case at the close of its case. The fact that the appellant opted to call evidence instead of submitting no case to answer at the close of the respondent's case does not change the equation. This error by the Court of Appeal on the burden of proof was an error that goes to the root of the matter which renders the whole judgment fundamentally flawed and liable to be set aside.

[38] In any case, as acknowledged by the Court of Appeal itself, forgery was not an issue before the court as it was not pleaded by both the appellant and the respondent. The pleaded case for the respondent was that the RM7 million was an interest-free loan it advanced to the appellant whereas the pleaded defence for the appellant was that the RM7 million was a non-refundable commission for the brokerage services it rendered to the respondent.

[39] That was the single most important issue before the High Court and indeed before the Court of Appeal. Forgery was not one of the issues. Therefore, while the Court of Appeal was correct in disallowing the appellant from raising the issue of forgery on the ground that it was not pleaded, it was a contradiction in terms for it to then place the evidential burden of proof on the appellant to prove forgery of the two vouchers, on the ground that the contents of the vouchers had been proven once they were produced and marked as exhibits, despite the fact that the authenticity (let alone the truth) of the documents was never established by the respondent.

[40] That disposes of our determination of the appeal but for completeness, we set out below ss. 101 and 102 of the Evidence Act which are codifications of the common law concept of burden of proof and on whom it lies. The provisions are clear and unambiguous and speak for themselves and need no further deliberation by us save for us to reproduce them for ease of reference:

> Section 101. Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

ILLUSTRATIONS

(a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.

A must prove the existence of those facts.

Section 102. On whom burden of proof lies

The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

ILLUSTRATIONS

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to his possession.

Therefore the burden of proof is on A.

(b) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

[41] For all the reasons aforementioned, our answers to the leave questions are as follows:

Leave question 1 – Negative.

Leave question 2 – Affirmative.

Leave question 3 – Negative.

Leave question 4 – Affirmative provided the document has been properly admitted in evidence.

[42] It follows that the appeal must be allowed with costs and we so order. The decision of the Court of Appeal is set aside, and the decision of the High Court is restored. My learned brothers Justice Abu Bakar Jais FCJ and Justice Vazeer Alam Mydin Meera FCJ have read this judgment in draft and have agreed with it. They have also agreed that this judgment shall form the judgment of the court.